Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 CG Docket No. 02-278

PETITION FOR EXPEDITED DECLARATORY RULING

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INTRODUCTION AND SUMMARY

It is hard to imagine anything more important to the public than the availability of reliable electric and gas service. The interruption of these services, for any reason, creates enormous inconvenience and a risk to public safety. Energy utilities strive to avoid such interruptions, and attempt to mitigate the inconvenience and risk to the public when they are unavoidable. To do so, energy utilities routinely need, and often are required, to contact their customers to provide important information about their service. Utilities often need to provide information to customers about, among other things, planned or unplanned outages, repair work, service cancellation, service restoration, or energy efficiency. These calls or texts are always important, and are often critical.

Unfortunately, the Telephone Consumer Protection Act ("TCPA"), and its implementation by a few courts, have caused utilities to risk litigation and enormous damages for doing what they should do—provide a critical service to the American public in a way designed to protect its well-being. While the Federal Communications Commission ("Commission") has touched on the subject more than once and has been clear that utilities' emergency communications to the public are exempt from any prior consent requirement in the TCPA, it has not yet been asked for—and thus has not yet provided—a comprehensive statement regarding the consent required for non-emergency communications from energy utilities. In the absence of such a statement, an aggressive plaintiffs' bar has filed and managed to keep alive litigation that, in a rational world, would kindly be described as absurd. As a result, energy utilities that wish to use common and highly effective means of communication to inform customers of critical, service-related issues, including automated text messages or calls to customers' wireless telephones, risk being haled into court to face billion dollar damage claims. We think the law is pretty clear and entirely reasonable. But until the Commission says so by issuing a comprehensive ruling on this subject, energy utilities

will be deterred from adopting the best practices for delivering important information to their customers.

Accordingly, the Edison Electric Institute ("EEI") and the American Gas Association ("AGA") respectfully submit this Petition for Declaratory Ruling asking the Commission to confirm that providing a telephone number to an energy utility constitutes "prior express consent" to receive non-telemarketing, informational calls at that number related to the customer's utility service. With a winter of snow and ice already upon us, and the inevitable utilities-related problems that is causing, we ask that this petition be given expedited treatment.

I. TIMELY CONTACT WITH ENERGY UTILITY CUSTOMERS IS CRITICAL

EEI is the association that represents all U.S. investor-owned electric companies. Its members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. EEI and its members are dedicated to ensuring a reliable supply of electricity, and they recognize that maintaining a high level of reliability requires constant commitment. AGA represents more than 200 local energy utility companies that deliver natural gas to more than 68 million homes, businesses, and industries throughout the United States. AGA's members deliver 94 percent of all natural gas provided by the nation's natural gas utilities and are committed to delivering natural gas safely, reliably, and cost-effectively in an environmentally responsible way.

EEI and AGA members have a strong track record of preparing for many types of circumstances that can affect their ability to generate and deliver energy. They work together with federal, state, and local governments and regulators to ensure that they can respond effectively to any service-affecting event. EEI and AGA members' efforts also include developing and implementing notification programs to provide customers with the best and most-up-to-date information available regarding service issues, whether those issues are the result of planned

outages or curtailment, natural disasters, unplanned outages, other emergencies, or customerrelated problems, such as delinquent bills that could lead to a cessation of service.

EEI and AGA members are also keenly aware of the need to use energy resources efficiently in order to make our energy supply more safe and reliable, to protect the environment and conserve natural resources, and to save customers money. EEI and AGA members constantly work to help homes and businesses get more value from their energy dollar, including by informing their consumers about, and encouraging participation in, conservation, energy efficiency, demand response, and other demand-side management programs. All of this is done with the enthusiastic support and/or under mandates from local and state governments, state and federal regulators, and the federal government.

To provide safe, reliable, and efficient service, EEI and AGA members often need to contact their customers to: (a) warn about planned or unplanned service outages; (b) provide updates about outages or service restoration; (c) ask for confirmation of service restoration or information about the lack of service; (d) provide notification of meter work, tree-trimming, or other field work; (e) verify eligibility for special rates or services, such as medical, disability, or low-income rates, programs and services; (f) warn about payment or other problems that threaten service curtailment; and (g) provide reminders about time-of-use pricing and other demandresponse events.

Some of these notification programs are mandated by state regulation.¹ In other cases, EEI and AGA members have adopted these programs at the urging of regulatory authorities.² Even when they are not in response to government action, energy utilities view such notifications as critical to providing safe, efficient, and reliable service, and to meeting their obligations to the communities they serve.³

Energy utilities have long used prerecorded message telephone calls and automatic telephone dialing systems to reach their customers about these service-related issues.⁴ Indeed, consumers have generally demanded calls from their energy utilities about their service, and have complained when they have not received such calls.⁵ As their regulators rightly expect, energy

See, e.g., The Board's Review of The Utilities' Response to Hurricane Irene, Order Accepting Consultant's Report and Additional Staff Recommendations and Requiring Electric Utilities to Implement Recommendations, Docket No. EO11090543, Recommendation 23-G-3 (Bd. of Pub. Utils., N. J., Jan. 23, 2013) (recommending that utilities "provide additional methods to report and check on the status of an individual outage" including via text messaging).

See Letter from Aryeh Fishman, Associate General Counsel, Edison Electric Institute, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (June 5, 2014) ("EEI June 5 2015 Ex Parte").

Most recently, EEI member Eversource Energy (formerly Northeast Utilities) found its service-related calling program to be critical to reaching customers during a Thanksgiving Day storm in New Hampshire.

⁴ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, FCC 92-443, 7 FCC Rcd 8752, ¶ 49 (1992) ("1992 TCPA Order") ("Many public utilities note that they communicate with their customers through prerecorded message calls and automatic telephone dialing systems to notify customers of service outages, to warn customers of discontinuance of service, and to read meters for billing purposes.").

See, e.g., Press Release, Sen. Charles Schumer, During Fall Storm, Tens of Thousands of Hudson Valley Customers Were Left in the Dark About When Power Would Come Back On, 2011 WLNR 26407672 (Dec. 21, 2011) (noting that utilities covering the Hudson Valley did not effectively communicate with customers about a major power outage or its expected duration); see also Press Release, J.D. Power & Associates, Price and Billing/Payment are Primary Drivers of Increased Overall Customer Satisfaction with Electric Residential Utilities (July 17, 2013) (noting that "improved communications during long outages increases satisfaction" and that "Satisfaction increases when utilities proactively communicate outage information regularly and clearly via the channels customers prefer, including utility-initiated phone calls, emails, text messages and social media sites.").

utility companies are sensitive to customer complaints and strive to improve customer service by doing what they can to reach out to consumers about service-related issues.⁶

Until relatively recently, such calls were placed to customers' landlines. But in the last few years, many customers have cancelled their landline telephone service in favor of wireless service, thus these calls are now often delivered to wireless phones. According to the Center for Disease Control's National Center for Health Statistics, as of the second half of 2013, 41 percent of U.S. households had only wireless phones, up from about 30 percent in the second half of 2010.⁷ These numbers are borne out by EEI and AGA members' experience. And even customers with landline service often provide a wireless number as their contact point.

As their customers have increasingly transitioned to the use of wireless phones, EEI and AGA's members have transitioned to new technologies for reaching those customers, including wireless-only technologies, such as text messaging. Where EEI and AGA members can identify a customer's contact number as a wireless number, or where a customer indicates the number is a wireless number, utilities can use automated texting technologies to provide those customers with information on service issues, such as service curtailments or service outage callbacks.

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State public utilities commissions, in fact, pay careful attention to customer satisfaction with utilities; some states allow utilities with high customer satisfaction ratings to collect performance bonuses from customers. *See* Elizabeth Douglas, *Edison Fined \$30 Million for Fraud*, L.A. TIMES (Sept. 19, 2008) *available at* http://articles.latimes.com/2008/sep/19/business/fi-edison19 (discussing falsified customer satisfaction records by Edison that allowed it to collect ratepayer-funded incentives for good performance).

Phil Goldstein, *Survey: More than 40% of U.S. Households Are Now Wireless-Only*, FIERCE WIRELESS (July 9, 2014) http://www.fiercewireless.com/story/survey-more-40-us-households-are-now-wireless-only/2014-07-09.

II. THE TCPA DOES NOT PROHIBIT NON-TELEMARKETING, INFORMATIONAL CALLS FROM A UTILITY TO ITS CUSTOMERS

A. The Rules Establish that Informational Calls to Numbers Provided During a Transaction Are Not Prohibited by the TCPA

Calls to landlines and wireless phones have always been treated differently under the Commission's TCPA rules. This difference is, at least in part, the result of the distinct billing schemes used for each kind of service. While the owner of a landline pays only for those calls that the owner places, the owner of a wireless line pays for both outgoing and incoming calls. As a result, when it promulgated the first TCPA rules, the Commission imposed a greater standard on autodialed calls made to wireless phones. For instance, telemarketing calls to wireless phones have never been subject to an "established business relationship" exception.⁸ At the same time, the Commission has long recognized an exemption from the TCPA rules for calls from wireless carriers to their subscribers when the subscriber is not charged for the call.⁹

When the Commission updated its TCPA rules in 2012, it declined to impose even more stringent rules on non-telemarketing calls to wireless phones. It had proposed to require prior express written consent for *all* calls to a wireless number using an autodialer or prerecorded message.¹⁰ But commenters urged the Commission to recognize that doing so would create an inconsistency with the Telemarketing Sales Rule,¹¹ as well as with the Commission's own rules

In the Commission's most recent Order, of course, the established business relationship exception for landlines was eliminated. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 12-21, 27 FCC Rcd 1830, ¶ 35 (2012) ("2012 TCPA Order").

⁹ 1992 Order ¶ 45.

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, FCC 10-18, 25 FCC Rcd. 1501, ¶ 20 (2010); see also 2012 TCPA Order ¶ 28.

Reply Comments of the Industry Trade Associations at 3-4, CG Docket No. 02-278 (June 21, 2010). *See also* Comments of the National Cable and Telecommunications Association at 1-2, CG Docket No. 02-278 (June 21, 2010); Comments of the National Council of Higher Education Loan Programs at 1-2 CG Docket No. 02-278 (June 21, 2010); ACA Comments at 9-10, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); Cargo Airline Association at 2, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); Cargo Airline Association at 2, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); Cargo Airline Association at 2, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); Cargo Airline Association at 2, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); Cargo Airline Association at 2, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); Cargo Airline Association at 2, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010); ATA Reply Comments at 2-3, CG Docket No. 02-278 (June 21, 2010);

applicable to land lines.¹² Instead, the Commission adopted a rule that requires "prior express written consent" only for telemarketing calls to wireless numbers, leaving intact the "prior express consent" requirement for non-telemarketing calls, favorably citing arguments by utility industry groups noting that calls about energy consumption, planned and unplanned outage notifications, and appointment reminders are the types of wireless calls¹³ that should not require prior express written consent.¹⁴ Indeed, the Commission noted that requiring prior express written consent for these calls would "serve as a disincentive to the provision of services on which consumers have come to rely."¹⁵

The "prior express written consent" requirement includes a number of specific obligations related to the form of the written consent, the language that must be used, and the kind of signature required. In contrast, the Commission's rules do not define "prior express consent." But it is clear from the Commission's implementing orders that "prior express consent" is different than "prior express written consent." Thus prior oral consent has been found to satisfy the "prior express consent" requirement. More importantly, however, the Commission has also held that provision

^{2010);} Financial Services Roundtable Comments at 4, 19-20, CG Docket No. 02-278 (June 21, 2010); MetroPCS Comments at 3-4, CG Docket No. 02-278 (June 21, 2010); MRA Comments at 4, CG Docket No. 02-278 (June 21, 2010); NSBA Comments at 1-2, CG Docket No. 02-278 (June 21, 2010); SmartReply Comments at 2, CG Docket No. 02-278 (June 21, 2010); SLSA Comments at 5, 10, CG Docket No. 02-278 (June 21, 2010).

¹² See Reply Comments of Industry Trade Associations at 3-4, CG Docket No. 02-278 (June 21, 2010).

Wireless calls, of course, also include text messages. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14,014, ¶ 165 (2003) (the TCPA's prohibitions "encompass both voice calls and text calls to wireless numbers, including for example, short message service (SMS) calls); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

¹⁴ 2012 TCPA Order ¶ 29 & n.79. Note also that the exemption for emergency calls continues to apply. 47 C.F.R. 64.1200(a)(1).

¹⁵ 2012 TCPA Order ¶ 29.

¹⁶ *Id*.

of a telephone number within the context of a transaction serves to provide "prior express consent" to receive calls related to that transaction.¹⁷

In the 1992 TCPA Order, the Commission found that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." The Commission has clarified this finding in subsequent orders, concluding in the ACA Order in 2008 that "the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." Six years later, in the GroupMe Order, the Commission clarified that the ACA Order "make[s] clear that consent to be called at a number in conjunction with a transaction extends to a wide range of calls 'regarding' that transaction."

[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.

We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.").

¹⁷ 1992 TCPA Order ¶ 31.

¹⁸ *Id*.

Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, Order, FCC 07-232, 23 FCC Rcd 559, ¶ 9 (2008) ("ACA Order") ("In the 1992 TCPA Order, the Commission determined that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." The legislative history in the TCPA provides support for this interpretation. Specifically, the House report on what ultimately became section 227 states that:

GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling, FCC 14-33, 29 FCC Rcd 3442, ¶ 11 (2014) ("GroupMe Order"). The ACA Order and GroupMe Order also made clear that consent for certain calls may be made through intermediaries such that "[c]alls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call," ACA Order ¶ 10, and that "a consumer's prior express consent may be obtained through and conveyed by an intermediary." GroupMe Order ¶ 6. Under these two rulings, then, calls reporting an outage to a utility customer by, for instance, the customer's transmission and distribution provider, rather than by the customer's retail energy service provider (as would typically be the case in states like Texas, where electric service is deregulated), would not violate the TCPA.

The Commission has also made clear that this understanding applies to calls made by an energy utility to its customers about service-related issues. In the 1992 TCPA Order, the Commission noted that "public utilities providing a third party notification service do not violate the prohibition against prerecorded calls to residences where the third party has given his or her prior express consent to the notification."²¹ Notably, there the Commission also said that many calls made by utilities fall within the broad exemption for calls made for "emergency purposes." Specifically, in the 1992 TCPA Order, the Commission found that "[s]ervice outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public."²² This, of course, comports with the legislative history of the TCPA, in which Congress explained that calls made for emergency purposes—and thus exempt from the TCPA—were "intended to include any automated telephone call that notifies consumers of impending or current power outages, whether those outages are for scheduled maintenance, unscheduled outages caused by storms, or power interruptions for load management programs."²³

B. Informational Calls to Numbers Provided to Energy Utilities by Customers Do Not Require Additional Consent

Given the clear language of the rules and of the Commission's implementing orders, one would think there is no need for this Petition. Unfortunately that is not the case. Without a

²¹ 1992 TCPA Order ¶ 51.

²² *Id*.

Statement of Cong. Edward Markey, Chair, House Telecom. & Fin. Subcommittee, 137 Cong. Rec. H 11307-01 (Nov. 26, 1991); see also Statement of Sen. Ernest Hollings, Chair, Senate Committee on Commerce, Sci. & Transp., 137 Cong. Rec. S 18781-01 (Nov. 27, 1991) ("[T]he FCC could find that 'emergency purpose' includes any automated telephone call that notifies consumers of impending or current power outages, whether these outages are for scheduled maintenance, unscheduled outages caused by storms or similar circumstances, cut off power due to late payment of bills, power interruptions for load management programs, or other reasons.").

definitive ruling from the Commission about calls to their customers, energy utilities will be (and are today) reluctant to bear the significant litigation risk of making such calls. This is particularly true where those calls may not be considered emergency communications because they are, for instance, about service restoration, non-payment, energy usage, or conservation. In fact, the absence of a statement by the Commission that non-telemarketing, informational calls to a telephone numbers provided by customers to their energy utilities are made with "prior express consent" has created an opening that an aggressive plaintiffs' bar has used against energy utilities for calls that bear no resemblance to the nuisance calls that spurred the enactment of the TCPA.²⁴

One EEI member is currently defending a suit in the Northern District of Illinois²⁵ that sadly illustrates the risk energy that companies bear for doing the right thing. Commonwealth Edison ("ComEd"), hoping to improve the speed and efficiency of its communications with customers, adopted a "Power Outage Alert Program," a two-way text-messaging program designed to allow ComEd to inform customers of power outages by text message, and to allow customers to report an outage to the utility by text message. ComEd rolled this program out to all customers who provided a wireless telephone number as their contact number. The first message ComEd sent to enrollees informed them of the program and gave instructions on how to opt out, in case any of those customers did not want to receive the informational text messages. Proving that no good deed goes unpunished, that initial message landed ComEd in federal district court, facing a class action suit. The suit survived a motion to dismiss, at least in part because the plaintiff carefully constructed a complaint that does not contain any facts stating how ComEd obtained his wireless number. The court, obligated to take the facts in the light most favorable to the plaintiff,

²⁴ See 1992 TCPA Order ¶ 2; id. ¶ 3.

²⁵ Grant v. Commonwealth Edison, No. 1:13-cv-08310 (N.D. Ill.).

denied ComEd's motion to dismiss and has ordered the parties to proceed with the expensive and time-consuming process of discovery.²⁶

The arguments presented by the plaintiff in the briefing on the motion to dismiss underscore the potential litigation risk for any utility defendant. The plaintiff argues that a TCPA claim requires allegations only that the defendant (1) made text message calls, (2) using an autodialer, (3) to a wireless number; he further states that the defendant's arguments that the plaintiff consented to receive the messages or that the messages fall within the emergency exemption are affirmative defenses that cannot be resolved on a motion to dismiss.²⁷ Though some courts have found differently, 28 many courts have agreed.29 This body of law creates an environment in which TCPA defendants who have consent, or make calls that are otherwise exempted, still must go through expensive discovery in order to defeat frivolous claims. And, of course, that does not account for the potential damages should the court rule against the utility. In ComEd's case, the potential damages could range from between \$600 million and \$1.8 billion, due to the TCPA's statutory penalty of \$500 per violation and the possibility of treble damages.³⁰ As EEI noted earlier this year, "the mere threat of such an improper application of the Commission's TCPA rules to these utility/customer communications may have begun to have a chilling effect because given the nature of their service and the large number of their customers, energy utilities

Motion to Dismiss Hr'g Tr., 5:6-21, June 5, 2014, Grant v. Commonwealth Edison, No. 1:13-cv-08310 (N.D. Ill.).

Plaintiff's Reply to Defendant's Mot. To Dismiss at 5, 7 (Mar. 21, 2014), *Grant v. Commonwealth Edison*, No. 1:13-cv-08310 (N.D. Ill.).

²⁸ See, e.g., Hanley v. Green Tree Servicing, LLC, 934 F. Supp. 2d 977, 982 (N.D. Ill. 2013).

See, e.g., Charvat v. Allstate Corp., 29 F. Supp. 2d 1147, 13-cv-7104, 2014 WL 866377, *1; Thrasher-Lyon v. Ill. Farmers Ins. Co., 861 F. Supp. 2d 898, 905 (N.D.Ill. 2012); Robbins v. Coca-Cola Co., No. 13-cv-132, 2013 WL 2252646, *2 (S.D. Cal. May 22, 2013); Manfried v. Bennett Law, PLLC, No. 12-cv-61548, 2012 WL 6102071, *2 (S.D. Fla. Dec. 7, 2012).

³⁰ 47 U.S.C. 227(b)(3).

must place a premium on regulatory compliance and are loathe to act in the face of ambiguous regulatory standards.... In the long run, other EEI members might have to consider curtailing their customer communications effort in the face of continued uncertainty regarding the application of the Commission's rules. Not only would this unanticipated effect be unfortunate, but it would also run contrary to the public interest."³¹ The Commission can counter this chilling effect by issuing an unequivocal statement regarding the applicability of the rules to non-telemarketing, informational communications from utilities to their customers.

EEI and AGA believe that the rules are clear: (1) Emergency communications to customers about their utility service are exempt from TCPA requirements; and (2) Non-telemarketing, informational communications to customers about their utility service at the number provided by the customer in connection with establishing or continuing service do not violate the TCPA.³² The Commission has already said that communications regarding utility service outages and interruptions are exempt from the TCPA.³³ And the *ACA Order* makes it plain that calls from a utility to its customer at the wireless number provided by the customer in the course of the transaction resulting in a delinquent bill are not prohibited by the TCPA.³⁴ It would be illogical

Letter from H. Russell Frisby, Jr. Counsel, Edison Electric Institute, to Marlene H. Dortch, Secretary, FCC, CG 02-278, (June 25, 2014). In some cases, this result would also be in conflict with state regulations. *See, e.g., supra* n.1.

³² Cf. 2012 TCPA Order ¶ 25 (noting that customers can provide prior express consent for limited purposes, such as service-related calls, by providing a wireless number to a calling party).

³³ See 1992 TCPA Order ¶ 51; 47 C.F.R. § 64.1200(a)(1).

ACA Order ¶ 10. Of course, despite the Commission's clear statement that it is not a TCPA violation to make a debt collection call to a wireless number provided in the course of the transaction that incurred the debt, at least one electric utility is currently being sued by a customer claiming that he did not "expressly consent" to have debt collection calls made to his wireless number by an autodialer or pre-recorded voice. See Complaint ¶ 17, Catton v. Florida Power & Light, No. 1:14-cv-22706 (S.D. Fl. 2014). Mr. Catton's claim may rest on an allegation (not made in his complaint) that he verbally revoked any consent he may have provided to Florida Power & Light to contact him at his wireless number. That claim would rely on a recent 11th Circuit decision in which the Court held that the TCPA permits individuals to verbally revoke consent. See Osorio v. State Farm, F.S.B., 746 F.3d 1242 (11th Cir. Mar. 28, 2014). The TCPA is silent on how and when consent is revoked, but a majority of decisions addressing the issue have found that revocation of consent must be in writing, e.g., Starkey v.

for the reverse to be true of calls to that same customer at the same number provided in connection with establishing electric or gas service regarding changes to that service, including planned service curtailments or restoration of service. But the lack of a definitive statement by the Commission as to those communications has created untenable litigation risks for energy utilities. The losers, of course, are utility consumers, who will not receive the critical and timely notifications that they deserve.

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Firstsource Advantage, LLC, 2010 WL 2541756, *3-4 (W.D. N.Y. 2010); Moore v. Firstsource Advantage, LLC, 2011 WL 4345703, *10 (W.D. N.Y. 2011); Moltz v. Firstsource Advantage, LLC, 2011 WL 3360010, *5-6 (W.D. N.Y. 2011); Cunningham v. Credit Mgmt., L.P., 2010 WL 3791104, *5 (N.D. Tex. 2010), report and recommendation adopted, 2010 WL 3791049 (N.D. Tex. 2010), while other courts have held that consent under the TCPA cannot be revoked at all, Saunders v. NCO Financial Systems, Inc., 910 F.Supp.2d 464, 468-469 (E.D. N.Y. 2012); Chavez v. The Advantage Group, 2013 WL 4011006, *4 (D. Colo. 2013). Again, though, a plaintiff has haled an electric utility into court—and the electric company must devote its time and resources to that litigation—because of an absence of a clear statement by the Commission as to the scope of the TCPA.

CONCLUSION

Service-related informational messages delivered to wireless phones are the most effective means of providing time sensitive, non-telemarketing information to utility customers. The Commission should ensure that the energy utility industries can continue to employ emerging communication technologies to contact their diverse customers, including public safety entities, government users, enterprise customers, and consumers, with time-sensitive information. Accordingly, in the public interest, the Commission should issue a Declaratory Ruling that the utility customer's provision of a telephone number, including a cellphone number, to an energy utility satisfies the TCPA consent requirements for such customer to receive non-telemarketing, informational calls at that number related to the customer's utility service.

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